Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Promoting Telehealth and	)	WC Docket No. 17-310
Telemedicine in Rural America	)	

APPLICATION FOR REVIEW

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November 9, 2018

EXECUTIVE SUMMARY

GCI Communication Corp. ("GCI") hereby seeks review of an unpublished order of the Wireline Competition Bureau, retroactively prescribing interstate interexchange rates for Funding Year ("FY") 2017 services to rural Health Care Providers ("HCPs"). The Bureau Decision prescribes rates $28 million *below* those determined through competitive bidding in a competitive market—which were also in line with commercial rates for comparable services, and supported by GCI cost studies—and imposes an unstated methodology for FY2018 and FY2019. Absent review by the full Federal Communications Commission, this order will have dramatic and far-reaching consequences for the Rural Health Care ("RHC") Program because it:

- Prescribes a rate setting methodology for 2017, 2018, 2019, and later years that requires annual recalculation of rates, but contains *no* explanation of how to do so or the methodology that the Bureau used;
- Fails to provide the guidance that rural HCPs and carriers need in order to understand what comparable rate support will or will not be accepted in the future, and to calculate rural rates and structure bids going forward;
- Is inconsistent with the Commission's ongoing efforts to deregulate services and rely on market mechanisms to constrain pricing;
- Requires use of a cost allocation and revenue attribution methodology that will reduce rural broadband services for mass market consumers;
- Forces carriers to reevaluate investments in rural Alaska networks; and
- Portends substantial disruption to RHC carriers' operations and to the RHC Program more broadly.

In rejecting GCI's justification of its rates and conclusorily announcing lower rates, the Bureau both incorrectly and unlawfully decided novel questions of law amenable to determination only by the full Commission, including:

- Finding that comparable rates must be based on the average of the total cost of service for a circuit without regard to the service bandwidth, rather than on a more rational per-Mbps basis;
- Applying "safe harbors" as if they were rules—ignoring other previously used, reasonable explanations of rate comparability;

- Ignoring volume and term discounts when determining rates for similar services;
- Finding that separate components of an end-to-end circuit must be justified using a single methodology;
- Allocating costs and prescribing rates for services to rural HCPs, rather than focusing on rates for similar services to other entities, as required by 47 U.S.C. § 254(h)(1);
- Adopting a fully distributed cost model approach to setting rural rates—which economists recognize is arbitrary and yields rate-of-return calculations that are "figments of the imagination"—that systematically undercompensates providers when applied to a competitive market;
- Prescribing a rate of return of 10.875% based on the ILEC rate of return, but ignoring the availability of NECA pooling for LECs and geographically specific differences in risk, and then using that rate of return to set post-hoc rates;
- Ignoring that, in a competitive market of at least four to five market participants, there is no reason to believe that a non-dominant interexchange carrier can charge a non-competitive rate of return.

Absent review and substantial course correction by the full Commission, the Bureau Decision is vulnerable on judicial review not only because the Bureau overstepped its delegated authority by ruling on novel issues, but also because the Bureau Decision:

- Fails to advance a reasoned explanation for the methodology it adopts;
- Fails to respond to (or even acknowledge) GCI's detailed, on-the-record substantive objections to the Bureau's approach and implicit legal interpretations;
- Prescribes rates in violation of 47 U.S.C § 205;
- Unlawfully penalizes GCI by applying a new approach to rural rate review and rate setting that massively reduces GCI's rates retrospectively without providing fair notice in advance.

For these reasons, the full Commission should grant GCI's Application for Review of the Bureau Decision and approve GCI's rate justifications. As it stands, the Bureau's decision fails to provide GCI and other carriers with adequate guidance to establish rural rates going forward, and will ultimately harm rural residents of Alaska.

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APPLICATION FOR REVIEW

GCI Communication Corp. ("GCI"), pursuant to 47 C.F.R. § 1.115, petitions for Commission review of the Wireline Competition Bureau's ("Bureau") unpublished October 10, 2018 Decision,[1] retroactively prescribing interstate interexchange rates for services to rural Health Care Providers ("HCP") at levels $28 million below the rates established through competitive bidding. The Bureau Decision purports to prescribe a rate setting methodology for 2017, 2018, 2019, and later years, but advances *no* explanation of that methodology. Instead, the Decision conclusorily announces funding levels based on manufactured rates.

GCI seeks review because the Bureau's three-page, non-substantive decision: 1) unlawfully misinterprets 47 C.F.R. § 54.607's guidance for determining rural rates; 2) prescribes an economically and legally unsound cost model and rate of return; 3) violates elemental principles of administrative law; 4) exceeds the Bureau's delegated authority; 5) prescribes rates in violation of 47 U.S.C. § 205; and 6) unlawfully applies a new approach to rate setting retrospectively without providing GCI fair notice in advance.

FACTS AND PROCEDURAL HISTORY

The Rural Health Care Telecommunications Program ("RHC" or "RHC Program") is both critically important and extremely successful in Alaska. Alaska is geographically and demographically unique—over four times the size of California, yet with an estimated population of only 737,080—and therefore presents unparalleled challenges to the delivery and provision of quality healthcare. Many rural Alaskan communities are hundreds of miles from the nearest highway, and accessible only by airplane, boat, or snow machine. Approximately 117 villages have fewer than 100 residents.

[1] Letter from Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur., to J. Nakahata & J. Bagg, Counsel for GCI (Oct. 10, 2018) ("Bureau Decision" or "Decision") (Exhibit AA).

For many of Alaska's residents, telemedicine is the only way to receive healthcare, and it is a mainstay of the state's healthcare providers. Alaska leads the way in developing innovative healthcare platforms and networks to reach rural residents, including a network of over 550 Community Health Aides/Practitioners serving more than 170 remote villages.[2] These providers use telemedicine to conduct triage; to determine when a patient can be treated locally rather than being flown to Anchorage; to enable the exchange of documents and images; to conduct patient education; and to provide doctor-led consultation and treatment, including psychiatry.[3]

The RHC Program has been critical to the innovative growth of telemedicine in Alaska. Unsurprisingly, given its uniquely large rural area, Alaska has been a top beneficiary of RHC Program disbursements since 2002, and currently receives 25 percent of nationwide RHC Program funding. Indeed, as a practical matter, the RHC and E-Rate programs are overwhelmingly responsible for spurring rural broadband deployment in sparsely populated and remote areas of Alaska—thereby improving both the availability of telecommunications services and the quality of life for rural residents, while dramatically reducing healthcare costs.

GCI has played a fundamental role in the growth of broadband infrastructure to meet expanding demand for services in rural Alaska, investing over $100 million over the past ten years—and $3 billion over the past three decades—to bring modern communications services to remote parts of the state. For example, in 2008, GCI acquired United Utilities and its western Alaska network, from which GCI built out and deployed its TERRA network—western Alaska's *first* terrestrial middle-mile network connecting back to Anchorage and the Internet. TERRA

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2 Alaska Community Health Aide Program, http://www.akchap.org/html/home-page.html (last visited Nov. 8, 2018).

3 Stewart Ferguson et al., *The Impact of Telehealth in Alaska*, Alaska Native Tribal Health Consortium 10–11 (Dec. 10, 2009), http://www.slideshare.net/HINZ/impact-of-telehealth-in-Alaska.

now delivers high speed broadband services to 45,000 Alaskans in 84 rural communities scattered across an area the size of the state of Texas.

This filing concerns GCI's provision of services under the RHC Program in Alaska. More specifically, since November 3, 2017—when Alaska HCPs received from USAC 101 Rural and Urban Rate Information Requests—GCI has engaged with USAC, the Bureau, and Eighth Floor staff in an intensive review of GCI's FY2017 rural rates. GCI's participation throughout this process has been collaborative, including responding to Bureau requests for data that non-dominant interexchange carriers have *never* been required to keep by *any* RHC rule or *any* interpretation thereof. GCI has also articulated (on the record) its legal concerns with the Bureau's freshly minted dictates regarding rural rate setting—generally with no response at all.

On November 21, 2017, GCI replied to USAC's initial 101 information requests with materials justifying GCI's FY2017 rural rates with the same 47 C.F.R. § 54.607(a) methodology with which GCI justified rates in USAC rural rate reviews in 2010 and 2015.[4] USAC responded with a request for unspecified additional materials. On December 7, 2017, GCI provided invoices and contracts to support every commercial rate it had used to establish its rates under 47 C.F.R. § 54.607(a).[5] Months then passed, during which GCI received no word from USAC.

On March 1, 2018, nearly 100 additional HCPs to which GCI provides services received information requests from USAC. Having still heard nothing of substance regarding the original set, GCI reached out to USAC. On a March 8, 2018 call with USAC and Bureau staff, GCI

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4 *See* Letter from Jennifer P. Bagg, Counsel for GCI, to USAC, Rural Health Care Program (Nov. 21, 2017) (Exhibit A); Letter from Jennifer P. Bagg, Counsel to GCI, to Deborah Gilliland et al., USAC (Oct. 6, 2015) (attached to Exhibit C); *id.* at Attachments (2010 USAC Letter and Breakdown of Rural Rates).

5 *See* Letter from Jennifer P. Bagg, Counsel for GCI, to USAC, Rural Health Care Program (Dec. 7, 2017) (Exhibit B).

learned for the first time (in the almost two decades that GCI has participated in the program) that the staff had concerns with GCI's methodology for justifying its rates. In response to these new concerns, and upon further review, however, GCI concluded that its rates for the transport component of its services could be justified under subsection (a), and the rates for the local loop component of its services should be justified under subsection (b). It resubmitted its rate justification materials on March 30, 2018, as well as supplemental materials evidencing the reasonableness of its rates, including a network-wide cost study of its TERRA fiber-microwave network and an outside economist report that concluded that there was no cross-subsidy between GCI's rural health care and retail services.[6] GCI also included—in response to a request from the Bureau—its rates *for similar services* provided under the E-rate program.[7] Six weeks later, the Bureau presented GCI with a compilation of additional E-rate customer rates that it suggested GCI should use as comparable rates, which indicated that GCI's rates for rural health care customers should be approximately 40 percent less than the rates resulting from competitive bidding. GCI then spent the next month reviewing the "analysis" and cataloging the myriad errors in the Bureau's E-rate data and explaining why, for example, rates for "best efforts" services are *not* comparable to those for the dedicated broadband transport service that GCI provides to HCPs.[8]

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6 *See* Letter from Jennifer P. Bagg, Counsel for GCI, to USAC, Rural Health Care Program (Mar. 30, 2018) ("March 30, 2018 Letter") (Exhibit C); *see also infra* n.23.

7 *See id.* at 9 ("*At the suggestion of the Wireline Competition Bureau Telecommunications Access Policy Division*, GCI has also included within its TERRA commercial customer rate averages its non-discounted TERRA E-rate customer rates for identical or similar services.") (emphasis added); *see also* Letter from Jennifer P. Bagg, Counsel for GCI, to USAC, Rural Health Care Program, at 1 n.2 (Apr. 24, 2018) ("April 24, 2018 Letter") (Exhibit D).

8 *See* April 24, 2018 Letter; Letter from John T. Nakahata et al., Counsel for GCI, to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur. (May 15, 2018) ("May 15, 2018 Letter") (Exhibit E).

From May through September, GCI engaged in a further concentrated back-and-forth with the Bureau on the cost models that GCI prepared for its two primary networks, TERRA and satellite.[9] Though GCI submitted these models to show the reasonableness of its rates as already established by the competitive bidding process and its commercial customer comparables, the Bureau dictated changes to these studies over GCI's detailed objections, and then apparently used them to prescribe rates without responding to those objections.[10] At the Bureau's request, GCI provided a short summary of these models (on two pages rather than one),[11]and also "showed its work" in submissions criticized by the Bureau as "voluminous." The Bureau Decision completely obfuscates this long-running dispute over the cost models, including GCI's fundamental disagreement with the Bureau's use of a fully distributed cost methodology, as well as its treatment of both cost allocation and volume and term discounts.

Although these were novel issues of fact, law, and policy that the Bureau lacked authority to resolve, the Bureau Decision *does* implicitly resolve them by prescribing rates according to an unexplicated methodology—while leaving critical questions unanswered. For instance, why is

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9 *See* Letter from John T. Nakahata et al., Counsel for GCI, to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur. (June 18, 2018) ("June 18, 2018 Letter") (Exhibit F); Letter from John T. Nakahata et al., Counsel for GCI, to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur. (June 21, 2018) (Exhibit G); Letter from John T. Nakahata et al., Counsel for GCI, to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur. (June 29, 2018) (Exhibit H); Letter from Jennifer P. Bagg, Counsel for GCI, to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur. (July 2, 2018) ("July 2, 2018 Letter") (Exhibit I); Email from John Nakahata, Counsel for GCI, to Elizabeth Drogula and Preston Wise (July 31, 2018) (Exhibit J); Letter from Jennifer P. Bagg, Counsel for GCI, to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur. (Aug. 21, 2018) ("August 21, 2018 Letter") (Exhibit K); Letter from Jennifer P. Bagg, Counsel for GCI, to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur. (Sept. 10, 2018) ("September 10, 2018 Letter") (Exhibit L); Letter from Jennifer P. Bagg, Counsel for GCI, to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur. (Sept. 17, 2018) ("September 17, 2018 Letter") (Exhibit M).

10 *See* sources cited *supra* note 9; *see generally* Bureau Decision.

11 *See* Bureau Decision at 2; *see also* July 2, 2018 Letter.

support for safe harbor rate comparison that was previously found acceptable by USAC now being rejected? Why is the safe harbor comparison one of absolute price, as opposed to the price per Mbps? And why does the rule necessitate justification only under one subsection of 47 C.F.R. § 54.607 rather than two (especially where one aspect of the service—transport—is a non-tariffed, competitive service and the other—local loop—is tariffed)? With regards to the cost study, how is it economically rational and consistent with the statute's plain language to require cost justifications on anything other than a network-wide basis? And where in the statute is the *Bureau* permitted to prescribe rates for a non-dominant interexchange carrier, much less apply the LEC rate of return, to non-LEC carriers such as competitive interexchange carriers? How can a non-dominant rate be unreasonable in the absence of market power? And what is the point of a competitive bidding process if the Bureau—rather than the market—is allowed to prescribe the rate? These are fundamental issues that must be addressed before GCI—or any other participant in the RHC Program—can understand how to establish rates going forward (and decide whether future participation in the program is sustainable). Standing alone, without any rational explanation, the unexplained rejection of previously acceptable rate support followed by a list of rates in the appendix to the Bureau Decision simply does not allow GCI or other providers to understand or apply the program standards or methodology going forward.

QUESTIONS PRESENTED

The Bureau Decision conflicts with statutes, regulations, and precedent; involves novel questions of law or policy; and is grounded in prejudicial procedural error.[12] These factors "warrant Commission consideration" of the following questions presented:

1. Whether the Bureau erred in interpreting 47 C.F.R. § 54.607 to find that GCI did not

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[12] *See* 47 C.F.R. § 1.115(b)(2)(i), (ii), (v).

"substantiate the legality of its requested rural rates" for FY2017.

2. Whether the Bureau incorrectly and unlawfully decided novel questions of law amenable to determination only by the full Commission, including:

    a. Finding that comparable rates must be based on an average of the total cost of service without regard to the service bandwidth, rather than on a more rational per-Mbps basis;

    b. Finding that 47 C.F.R. § 54.607 requires ignoring volume and term discounts when determining rates for similar services;

    c. Finding that separate components of an end-to-end circuit must be justified using a single methodology;

    d. Prescribing rates post hoc, focusing only on RHC customers, utilizing a fully distributed cost allocation methodology that is economically irrational and systematically undercompensates carriers in a competitive market, and applying an inadequate rate-of-return of 10.875%.

3. Whether the Bureau Decision violated 47 U.S.C. § 205 both *substantively*—because only the Commission has authority to prescribe rates and practices—and *procedurally*—because such prescriptions require both a finding that the rates are "just and reasonable" and an opportunity for a hearing, neither of which occurred here.

4. Whether the Bureau Decision violated the law by announcing a new interpretation of 47 C.F.R. § 54.607 and then applying that interpretation retrospectively without fair notice.

ARGUMENT

I. The Bureau Decision Is Fundamentally Flawed and Fails to Provide Adequate Guidance to Establish Going-Forward Rural Rates.

A. GCI articulated and fully justified the methodology it used to calculate its rates under 47 C.F.R. § 54.607, and the Bureau erred in finding to the contrary.

While the Bureau Decision fails to explain the methodology it used to prescribe rural rates for FY2017, GCI both carefully articulated its methodology and fully demonstrated that its rates were justified. The Bureau erred in finding to the contrary.

1. 47 C.F.R. § 54.607(a) permits the calculation of comparable rates on a per-Mbps basis.

47 U.S.C. § 254(h)(1)(A) entitles service providers to the difference between the rural rates they typically charge and the rates paid under the RHC Program—equivalent to urban rates—by rural healthcare providers. Under the program, eligible healthcare providers must "participate in a competitive bidding process" pursuant to FCC rules.[13] Section 54.607 of the rules provides "rural rate" review criteria, stating: "The rural rate shall be the average of the rates actually being charged to commercial customers, other than health care providers, for identical or similar services provided by the telecommunications carrier providing the service in the rural area in which the health care provider is located."[14] The Commission's outdated safe harbor categories establish a range of circuit bandwidths that can be considered "identical or similar services," but the rules do not say *how* to calculate an *average* of the rates within those ranges.[15]

A per-Mbps comparison is the only logical way to apply 47 C.F.R. § 54.607(a) consistent with the requirements of 47 U.S.C. § 254(h)(1)(A).[16] Calculating the rural rate through a simple average of the absolute price for a service without regard to the service bandwidth risks the absurd—and statutorily impermissible—result that a carrier could be compensated *more* than the difference between the two rates. If, for example, a carrier's only comparable services within the 1.41–8 Mbps safe harbor range are 5 commercial customers with 5-Mbps Ethernet service priced at $250, calculating the rural rate as a simple average yields a price of $250, *regardless of* the type of service a health care provider requests within that range. So if an HCP requests a 1.5-

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13 47 C.F.R. § 53.603(a).

14 *Id.* § 54.607.

15 *See Rural Health Care Support Mechanism*, Report & Order, Order on Reconsideration & Further Notice of Proposed Rulemaking, 18 FCC Rcd. 24,546, 24,564 ¶¶ 34–35 & n.111 (2003). The FCC's safe harbors were developed to assess the rates charged in rural areas versus the rates charged in urban areas, not to formulate the rural rate. *Id.* 24,563 ¶ 31.

16 *See* May 15, 2018 Letter at 4–10; *see also* March 30, 2018 Letter at 8–13.

Mbps DS1 service, the rural rate forming the basis of the carrier's compensation would be $250, even though the cost of that lower capacity service is far less and logically should be calculated as $75 on a per-Mbps basis (i.e., $250/5 Mbps x 1.5 Mbps). Ignoring such differences in bandwidth conflicts with 47 U.S.C. § 254(h)(1)(A) and contradicts the basic policies underlying the RHC Program.[17] Yet the Bureau Decision—without explanation—appears to endorse staff's statements that only a simple average, without regard to the service bandwidth, is permitted.[18]

2. 47 C.F.R. § 54.607(a) should be interpreted to account for bulk discounts when determining rates for similar services.

The Commission's rules also do not address how to account for volume and term discounts. Such bulk discounts are encouraged by the Commission because they reflect the fact that costs are lower when serving higher-volume purchasers for longer periods of time.[19] The Bureau Decision ignored comparability among similarly sized purchases of middle-mile capacity and examined only individual circuits, which were priced differently because of different overall purchase volumes. This imposes the same rate on all customers, regardless of volume and terms; requires carriers to absorb the burden of customers that purchase lower-capacity services for shorter terms; and discourages carriers from offering volume and term discounts, thus increasing the prices to be supported by USF. The Bureau also dictated GCI's rate structure by reducing all

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[17] Because the Commission has never addressed how to calculate an average across a range of similar services, this is a novel question of policy that must be addressed by the full Commission.

[18] As GCI discussed with the Bureau, carriers are not *required* to use the safe harbors when determining rate comparability. March 30, 2018 Letter at 5. By nature, safe harbors are optional methods of compliance that leave open other methods—here, other reasonable explanations of rate comparability such as GCI's per-Mbps approach. By rejecting GCI's methodology, the Bureau appears to be applying the RHC safe harbors as if they were mandates.

[19] *Reg. of Bus. Data Servs. for Rate-of-Return Local Exch. Carriers*, Report & Order, Second Further Notice of Proposed Rulemaking & Further Notice of Proposed Rulemaking, FCC 18-146, WT Docket Nos. 17-144, 16-143, 05-25, ¶ 77 (rel. Oct. 24, 2018).

rates by a pro rata amount, which makes no business or economic sense. The Bureau therefore erred in rejecting GCI's argument that a reasonable interpretation of 47 C.F.R. § 54.607(a) must account for bulk discounts.

3. *47 C.F.R. § 54.607 should be interpreted such that different components of a circuit can be justified under different prongs of the rule.*

GCI's rates consist of two components: the middle mile transport service, which GCI provides directly and is competitively priced, and the local loops, where tariffs vary across nearly twenty Alaska local exchange carriers. Section 54.607 states that if a carrier's rate justification cannot rely on actual rates charged to commercial customers because it is "not providing any identical or similar services in the rural area," the carrier should rely on tariffs or other publicly available rates; and only if neither method works, the carrier must submit cost-based rates for approval.[20]

Because local loops are tariffed and transport service is not, separately justifying each component is the only way to satisfy 47 C.F.R. § 54.607 without a burdensome and disfavored cost study. GCI thus used subsection (a) to determine the transport component of the rate using a per-Mbps comparison, and the first part of subsection (b) to justify the local loop component.[21] But the Bureau rejected GCI's approach, with no rational explanation, and imposed the cost model discussed below. Because GCI's approach is consistent with settled practice and a reasonable interpretation of 47 C.F.R. § 54.607, however, the Bureau erred in rejecting it.

[20] 47 C.F.R. § 54.607(b).

[21] May 15, 2018 Letter at 10–13; *see also* March 30, 2018 Letter at 8–13, 16–17.

B. Rather than accepting GCI's well-justified methodology, the Bureau imposed a cost study that was fundamentally flawed.

The Bureau Decision states that GCI was "required to seek approval . . . using a cost-based approach"—even though GCI was never told that.[22] In fact, GCI *voluntarily* provided cost studies to USAC as supplemental evidence that its rates were justified under 47 C.F.R. § 54.607(a).[23] Ultimately, however, the Bureau applied its own cost study, based on its "review of GCI's itemizations of costs of providing [RHC] services"[24]—but it contained multiple errors.

1. Prescribing rates in a competitive bidding environment is irrational, economically unsound, and conflicts with Commission precedent.

As GCI discussed with the Bureau,[25] the primary method of determining appropriate rates for RHC-supported services is competitive bidding. The rules in § 54.607 are not meant to supplant such bidding, but to "sanity check" competitive bidding results. Because all of GCI's rates at issue were the result of competitive bidding,[26] using a cost study to prescribe rates is economically unsound and irrational: "Rate regulation of a firm in a competitive market harms consumers."[27]

Moreover, using § 54.607(b) to set the rural rate constitutes ex ante price regulation and thus conflicts with Commission precedent. The Commission long ago de-tariffed non-dominant interexchange carrier rates, finding that "it is highly unlikely that interexchange carriers that lack

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22 Bureau Decision at 2.

23 March 30, 2018 Letter at 13–16. Those studies were reviewed by The Brattle Group, a preeminent economics consulting firm, which concluded that their methodology was reasonable and in line with recognized practices. *See generally* The Brattle Group, Rate of Return Analysis of GCI's TERRA Network (Mar. 30, 2018) (included in Exhibit C); The Brattle Group, Rate of Return Analysis of GCI's Satellite Network (June 18, 2018) (included in Exhibit F) (collectively "The Brattle Reports").

24 Bureau Decision at 3.

25 June 18, 2018 Letter at 1–2.

26 See March 30, 2018 Letter at 16 (explaining that GCI lost over 50% of the bids that it submitted from 2013 to 2017).

27 *Nat'l Ass'n of Telecomms. Officers & Advisors v. FCC*, 862 F.3d 18, 25 (D.C. Cir. 2017).

market power could successfully charge rates, or impose terms and conditions, for interstate, domestic, interexchange services that violate §§ 201 and 202 of the Communications Act."[28] More recently, in the *BDS Order*, the Commission stated that it would "apply ex ante rate regulation only where competition is expected to materially fail to ensure just and reasonable rates."[29] Here, there is no basis to conclude that competition will materially fail simply because a carrier has not sold a particular service to a commercial customer in a given rural area, especially when service providers and rates are being selected by competitive bidding.

2. *The Bureau's cost study was contrary to law and basic economics.*

The Bureau Decision seemingly was based on its own calculation of cost-based rates. Those calculations, however, violate the applicable statute and regulations, and conflict with core economics principles and Commission precedent. The Bureau's apparent cost allocations artificially increase the calculation of GCI's purported returns on RHC services, thereby causing the Bureau to substantially reduce GCI's FY2017 compensation.

Erroneously Allocating Costs to RHC Services Alone. The Bureau directed GCI to produce a cost model that allocated the common costs of its TERRA and satellite platforms (which are essentially all costs of those platforms) to RHC customers, as distinct from all other customers, including E-Rate, commercial, and mass market broadband. GCI pointed out[30] that the Bureau fundamentally misinterpreted 47 U.S.C. § 254(h)(1), which specifies that the rate at which the carrier serving the RHC is to be compensated is the rate that would be charged "for similar services provided to *other customers* in comparable rural areas in that State." By

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[28] *Policy & Rules Concerning the Interstate, Interexchange Marketplace*, Second Report & Order, 11 FCC Rcd. 20,730, 20,750 ¶ 36 (1996).

[29] *Bus. Data Servs. in an Internet Protocol Env't.*, Report & Order, 32 FCC Rcd. 3459, 3499 ¶ 86 (2017) ("*BDS Order*").

[30] June 18, 2018 Letter at 6; September 10, 2018 Letter.

allocating common costs of TERRA and satellite platforms to RHC customers as distinct from other customers, the Bureau Decision conflicts with the statute—as well as with 47 C.F.R. § 54.607(b)(2), which requires carriers to consider anticipated and actual demand for services "by all customers who will use the facilities." The correct approach would have been to examine the costs across all customers and all services, not just RHC customers.

Erroneously Requiring Fully Distributed Cost Allocations. The Bureau then compounded its error by specifying use of a fully distributed cost methodology to allocate the common costs of the TERRA and satellite platforms among different services (Priority, Normal, and Best Efforts). The Bureau wholly ignored the only economic evidence in the record, a seminal article by Drs. Baumol, Koehn, and Willig, which establishes that fully distributed cost allocation methods yield "arbitrary" results.[31] That article also demonstrates that in a competitive market, use of such a methodology necessarily leads to under-recovery of costs because the provider is limited to the lower of the rates permitted by fully distributed cost allocations or the competitive market.[32] Costs should therefore be allocated (and return should be measured), if at all, at the level of the platform, including all services offered over the platform. This conclusion is buttressed by 47 C.F.R. § 54.607(b)(2), which requires carriers to

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[31] "Where the activities of a firm benefit from substantial common investments or substantial common outlays (or both), there is no way to calculate a rate of return for any or all of the company's individual activities, one by one. *Indeed, the difficulty is not that we cannot determine these numbers, but that such numbers themselves are necessarily figments of the imagination*. . . . [T]he numbers that emerge from the process are indeed arbitrary, [and thus] any prices determined by the regulator with their aid can only have a random relation to the prices that would emerge in competitive markets . . . ." W. Baumol, M. Koehn, & R. Willig, *How Arbitrary Is 'Arbitrary'?—Or, Toward the Deserved Demise of Full Cost Allocation*, Pub. Utils. Fortnightly, Sept. 3, 1987, at 17 (emphasis added) (attached to June 18, 2018 Letter).

[32] *Id*. at 17.

consider anticipated and actual demand for services "by all customers who use the facilities." This language plainly focuses on the *overall* facility costs.

The Brattle Reports show that none of GCI's TERRA or satellite rates were cross-subsidized by other rates (i.e., all exceeded incremental cost).[33] With all services bearing at least their incremental costs, and fully distributed cost allocations yielding only arbitrary results, there is no economic rationale for departing from the market-based recovery set through GCI's pricing of its TERRA or satellite services, and the Bureau Decision provides no basis for doing so.

Ignoring Cost Causation Among Different Services. Although the Bureau Decision is not clear, it purports to reject "speculative" cost allocators.[34] It appears that the Bureau rejected GCI's proposed cost allocators, which took into account the fact that different service tiers create different imperatives to upgrade network capacity. Simply put, Priority service is much more likely to cause a capacity upgrade than a lower tiered service (e.g., Best Efforts service). GCI explained its cost causation approach, informed by the fact that cost causation is the usual basis for cost allocation. The Bureau Decision fails to explain why cost causation would not be a relevant metric.

Ignoring Distorted Revenue Attribution. Although GCI prepared the original cost model, GCI realized that the model contained an inherent flaw, especially if the model were to be applied to subsequent years, as the Bureau did for 2018, 2019, and later years. Because the model attributes revenue based on bandwidth, an increase in mass market broadband consumption—because, for example, GCI increases speed tiers or usage allotments—increases the revenue attributed to the TERRA network, even when the total revenue does not increase.

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33 *See generally* The Brattle Reports, which were not disputed by the Bureau Decision.
34 *See* Bureau Decision at 2. The actual cost allocators are not specified in the Decision.

This both artificially increases TERRA revenues and artificially allocates more costs of the TERRA platform to non-RHC customers, which artificially inflates the rate of return for RHC.

GCI pointed this out to the Bureau and cautioned that adopting this methodology along with fully distributed cost allocations to RHC services would create a pricing mechanism that discourages providing any mass market rural broadband services—thus frustrating the Commission's goal of closing the digital divide.[35] The entire pricing methodology suggested by the Bureau is therefore fatally flawed, yet the Decision does not even acknowledge this point.

3. The 10.875% rate of return applied in the Bureau Decision is unjustified and too low for GCI's RHC services.

GCI also explained that there was no rational basis to use the low ILEC-prescribed rate of return of 10.875% proposed by the Bureau.[36] The market in Alaska is competitive, containing four to five underlying facilities-based providers. The Bureau did not explain how it would be plausible for competitive bidding in such a market to yield supra-competitive returns. The Bureau Decision falsely characterizes GCI as "not explain[ing] why the factors underlying the Commission's . . . calculations for the smallest carriers in the country . . . would suggest [a different] rate of return."[37] In fact, GCI submitted multiple documents illustrating how it calculated the rate of return in its cost studies, and why that rate of return is reasonable.[38]

The 10.875% ILEC-prescribed rate of return is inapplicable for multiple reasons. First, the Commission has not adopted a prescribed rate of return for interexchange services, let alone for interexchange services to rural Alaska. The fact that the ILEC rate was calculated including

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[35] June 18, 2018 Letter at 8–9.
[36] *Id.* at 2–4.
[37] Bureau Decision at 3.
[38] *See* March 30, 2018 Letter; June 18, 2018 Letter; June 29, 2018 Letter; July 2, 2018 Letter; Revised Bandwidth Allocation Methodology (attached to August 21, 2018 Letter); September 17, 2018 Letter.

some Alaska ILECs (along with Lower 48 ILECs) is a non sequitur in determining interexchange carrier rates. Second, there is no reason to think that it would be reasonable to apply the ILEC-prescribed rate of return here. The two contexts involve different types of carriers operating in very different markets. And, unlike ILECs, interexchange carriers lack the risk-mitigation mechanism of NECA pooling. These differences, along with the considerable risk introduced by arbitrary program administration, render the 10.875% ILEC-prescribed rate of return too low for the market in which GCI operates—another point the Bureau Decision fails to address.

C. The Bureau Decision fails to provide adequate guidance and will cause disruption going forward.

Going forward, the Bureau Decision fails to provide any guidance as to what comparable rate support will be accepted, or how rural HCPs and carriers should calculate rural rates and structure their future bids. The Decision does not sufficiently articulate or explain its methodology to allow GCI—or other carriers—to apply it to future years.[39] Not only is it too late to apply this novel methodology to FY2018, but GCI has no idea how to apply it in preparing bids for FY2019 or beyond. Even if GCI and the HCPs with multi-year contracts were permitted to renegotiate the terms for subsequent years, the lack of any practical guidance in the Bureau Decision undermines any ability to do so.

The Bureau Decision produces additional, broad harm by ignoring the proper functioning of a competitive market. This undermines the Commission's decision to deregulate services, as well as its efforts to rely on market mechanisms to constrain pricing.[40] It also unsettles the RHC Program and the entire Alaska market: It discourages continued investment in Alaska networks; pushes carriers to consider technology choices based on funding results rather than suitability;

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[39] Indeed, GCI has been unable to replicate the Bureau's calculation of the prescribed FY2017 rates.

[40] *See, e.g.*, *BDS Ord*er at 3499 ¶ 86.

and, due to the Bureau Decision's revenue attribution and cost allocations, forces GCI to curtail rural mass market broadband services that would otherwise utilize these facilities.

II. The Bureau Decision Violates Fundamental Administrative Law Principles.

The APA requires that courts "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[41] Under this standard, an agency must engage in "reasoned decisionmaking," which requires it to "intelligibly explain[] the reasons" for its choices.[42] Moreover, "an agency's failure to respond meaningfully to objections raised by a party renders its decision arbitrary and capricious."[43]

GCI submitted scores of pages justifying its rates and articulating objections to the Bureau's approach as summarized above. In response, the Bureau issued a three-page decision claiming that GCI had failed to justify its rates, and adopting much lower rates in an appendix with essentially no explanation or even acknowledgement of the issues implicitly decided. The Bureau also failed to respond to GCI's primary arguments in any meaningful way. In both ways, the Decision plainly fails to satisfy the reasoned decisionmaking requirement of the APA.[44] The full Commission must therefore review the Bureau Decision to avoid reversal on this ground.

III. The Bureau's Determination Exceeds Its Delegated Authority.

A. Novel questions can only be decided by the full Commission.

47 C.F.R. § 0.291(a)(2) prohibits the Bureau from ruling on "novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines." Indeed, the Commission has consistently found that Bureau actions within its delegated authority must be

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[41] 5 U.S.C. § 706(2)(A).

[42] *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 764–65 (2016).

[43] *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011).

[44] *See, e.g., Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C.Cir. 1993).

based on "sound interpretation" of existing "statutory provisions or regulatory policy."[45] The Commission has held, for example, that "the Bureau exceeded its delegated authority" where "there [was] no Commission precedent—one way or the other—on the appropriateness" of applying a rule "under circumstances similar" to those before it.[46] Similarly, the Bureau "erred and exceeded its delegated authority" where there was no "analogous Commission-level precedent to the facts presented."[47]

The Commission applied this principle in a proceeding that also involved ratemaking methodology: *Responsible Accounting Officer Letter 20* ("*RAO 20*"). There, the Common Carrier Bureau issued a letter setting forth "ratemaking instructions" for "how to account for ['post retirement benefits other than pensions' or 'OPEB'] costs."[48] While the Commission "tentatively agree[d]" with the Bureau's treatment of OPEB costs, it nonetheless held that *RAO 20* "exceeded the Bureau's delegated authority to the extent that it directed exclusions from and additions to the rate base for which the [existing] Part 65 rules do not specifically provide."[49] Here, as in *RAO 20*, the Bureau's determinations went beyond "explanation" or "interpretation" to "chang[ing] the Commission's [applicable] rules" for determining rates.[50]

Significantly, Chairman Pai has harshly criticized making such substantive decisions at the Bureau level. For example, then-Commissioner Pai joined Commissioner O'Rielly in a joint statement that specifically criticized the issuance of "two major items" by the Wireless Bureau,

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45 *TRT Telecomms. Corp.*, 77 F.C.C.2d 845, 848 ¶ 7 (1980).
46 *Appl. of Tully-Warwick Corp.*, 95 F.C.C.2d 1427, 1430 ¶ 5 (1983).
47 *Appl. of Little Dixie Radio, Inc.*, Mem. Op. & Order, 25 FCC Rcd. 4375, 4378 ¶ 5 (2010).
48 *Responsible Accounting Officer Letter 20*, Mem. Op. & Order & Notice of Proposed Rulemaking, 11 FCC Rcd. 2957, 2957 ¶¶ 1, 3 (1996).
49 *Id.* at 2961–62 ¶¶ 25–29.
50 *Id.* at 2960 ¶ 21.

in lieu of action by the full Commission, as "not how democracy works."[51] The policy issues here should likewise be addressed by the full Commission.

B. The Bureau here unlawfully purported to determine multiple novel questions.

Here, it is unusually clear that the Bureau's determination overstepped its authority and ruled on new and novel questions because it did not even claim to be applying any existing Commission precedent. As GCI explained to the Bureau, GCI had used the same methodology for determining rural rates consistently over many years and USAC *approved* the methodology on multiple occasions.[52] More recently, a 2015 USAC audit *approved* rates based on the methodology GCI used here,[53] from which the Bureau now departs without notice.

To justify abandoning its past rate review practices, it was necessary for the Bureau to change course, at least implicitly, on a number of novel legal issues. GCI's substantive arguments on those issues—as well as the Bureau's inadequate or nonexistent responses—are set forth in detail above. None of those findings applies existing Commission precedent, and each goes to fundamental policies underlying the program. These policies accordingly must be established by the full Commission, not the Bureau.

IV. The Bureau Decision Violates 47 U.S.C. § 205 in Multiple Respects.

Section 205 of the Communications Act authorizes the Commission to "determine and prescribe" a "just and reasonable charge" and a "just, fair, and reasonable" "classification,

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51 *Joint Statement of Commissioners Ajit Pai and Michael O'Rielly on the Abandonment of Consensus-Based Decision-Making at the FCC*, 2014 WL 7220034, *1 (Dec. 18, 2014); *see also Basic Serv. Tier Encryption*, Report & Order, 27 FCC Rcd. 12,786, 12,828 (2012) (Commissioner Pai, concurring in part).

52 *See* March 30, 2018 Letter at 6. Since USAC has no authority to make policy or interpret unclear rules, *see* 47 C.F.R. § 54.702(c), and multiple audits took place over a period of years, these approvals necessarily reflected Bureau and Commission policy.

53 March 30, 2018 Letter at 7.

regulation, or practice" after a "full opportunity for hearing."[54] But the *Bureau* has no delegated authority to prescribe rate-setting practices or specific charges under 47 U.S.C. § 205. Moreover, the Bureau Decision fails to make the required finding that its prescriptions were "just and reasonable," and there was no opportunity for a hearing.

A. The Bureau Decision purports to "prescribe" both practices and charges within the meaning of 47 U.S.C. § 205.

Determining whether agency action amounts to a "prescription" within the meaning of 47 U.S.C. § 205 is sometimes difficult—but not here. In *Nader v. FCC*, the D.C. Circuit expressly held that where the "practical effect of the Commission's . . . order was to limit" the permissible "rate of return to 8.5%," this "was a prescription under section 205."[55] Here, the Bureau *expressly* adopted a "10.875% rate of return," which is plainly a prescription under *Nader*. But the Bureau did not merely prescribe a rate of return; it also purported to adopt a rate-setting methodology *and* prescribe the specific "rates set forth in an Appendix" to the challenged decision.[56] The Bureau Decision thus prescribed particular rate-setting practices, a required rate of return, and specific "charge[s]" for services provided by GCI—all in violation of Section 205.

B. The Bureau has no delegated authority to adopt a rate-setting methodology, to set a rate of return, or to prescribe specific charges.

The Bureau does not suggest any basis on which it—as opposed to the full Commission—might have authority to make the prescriptions in the Bureau Decision. It lacks such authority. First, as the Commission held in *RAO 20*, the Bureau has no authority to adopt "ratemaking instructions . . . direct[ing] exclusions from and additions to the rate base" for which the Commission's rules do not "specifically provide."[57] But that is precisely what the Bureau

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54 47 U.S.C. § 205(a).
55 *Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975).
56 Bureau Decision at 1.
57 *RAO* at 2961 ¶¶ 25–29.

did here, including by adopting a fully distributed cost model, which fundamentally *mandates* the inclusion of some costs and the exclusion of others from the rate base. Although *RAO 20* did not address 47 U.S.C. § 205, prescribing a rate-setting methodology is typically undertaken by the full Commission[58]—and, again, the Bureau here did not invoke any authority for doing so.

Second, 47 U.S.C. § 155(c)(1) expressly *prohibits* the Commission from delegating to the bureaus the power to conclude hearings on the lawfulness of rates.[59] Specifically, Section 155(c)(1) *excludes* functions "referred to" in Section 204(a)(2) from those that may be delegated to the bureaus, and 47 U.S.C. § 204(a)(2) includes "hearing[s]" that "concern[] the lawfulness" of any "charge."[60] Section 155(c)(1) also precludes delegation of any complaint regarding rates and charges, and of course, any challenge to an existing rate would typically be brought as a complaint. Accordingly, only the full Commission, not the Bureau, has the authority to determine lawful rates, both prospectively and retrospectively.

Nader's discussion of whether the full Commission has authority to prescribe a specific rate of return reinforces this point. There, the D.C. Circuit noted that "[o]n its face, section 205 only authorizes the Commission to prescribe charges, classifications, regulations and practices, not rates of return."[61] The court did find "that within the power to prescribe charges is the power to determine and prescribe those elements that make up the charge," including the rate of return.[62] Again, however, 47 U.S.C. § 155(c)(1) indicates that the Bureau *lacks* authority to

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58 *See, e.g.*, *Verizon v. FCC*, 535 U.S. 467 (2002) (upholding rate-setting methodology adopted by the full Commission).

59 47 U.S.C. § 155(c)(1).

60 *See id.*; 47 U.S.C. § 204(a)(1), (2); *see also Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 672 (D.C. Cir. 2006) (noting that 47 U.S.C. § 155(c)(1) "prohibits the Commission from delegating to one of its bureaus the power to conclude hearings on the lawfulness of rates under § 204(a)(2)").

61 *Nader*, 520 F.2d at 203.

62 *Id.* at 203–04.

prescribe charges—and thus the authority to prescribe rates of return as well.

C. Even the full Commission can set rates only pursuant to the process mandated by 47 U.S.C. § 205.

As the *Nader* court observed, "[t]he essential elements of a valid prescription order" under 47 U.S.C. § 205 "are a full opportunity to be heard and a finding that the action taken is just and reasonable."[63] Neither of those procedural requirements was satisfied here.

1. The Bureau failed to make the required finding that its prescriptions were just and reasonable.

The Second Circuit's decision in *AT&T v. FCC*[64] makes clear that there must be a finding that the action taken is "just and reasonable" before the Commission may make any prescription within the meaning of 47 U.S.C. § 205. In *AT&T*, carriers challenged both a Commission requirement that they allow all private-line customers to benefit from a certain kind of rate, and the specific level at which the Commission set that rate. The court wrote that "[t]he Commission's authority to prescribe rates and practices is derived from § 205(a) of the Communications Act."[65] But "[t]hat authority is not unlimited. To prescribe a practice, the Commission must find that it is 'just, fair and reasonable,' and to prescribe a rate, it must find that the rate is 'just and reasonable.'"[66] With respect to the practice challenged there, the court held that it was not enough for the Commission to find that it was the "best of the alternatives" before it—the fact that the Commission's approach "seem[ed] preferable" to other alternatives "on an incomplete record [did] not in itself establish that that method would be shown on a complete investigation to be just, fair, and reasonable."[67] The same is true here. The record here

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63 *Id.* at 204 (citations omitted).
64 *Am. Tel. & Tel. Co. v. FCC*, 449 F.2d 439 (2d Cir. 1971).
65 *Id.* at 450.
66 *Id.*
67 *Id.* at 450–51.

was not fully developed because there was no hearing or other fact-finding process—and while the Bureau appears to have believed its rate-setting method was "preferable" to other alternatives, the Decision contains no finding that it is "just, fair, and reasonable."

With respect to rates, the *AT&T* court found that the Commission's rate prescription was "in effect . . . equivalent to an order requiring a widespread rate reduction."[68] But the Commission made no "finding that the rate prescribed [was] just and reasonable," and "[i]ts order [was] therefore invalid for not complying with the requirements of the Act."[69] Again, the same is true here. The Bureau Decision was "equivalent to an order requiring a widespread rate reduction," but it contained no finding that the prescribed charges were just and reasonable.

2. The Bureau failed to provide for the required hearing.

Section 205 requires not only a finding that the action taken is "just and reasonable, but also a "full opportunity for a hearing."[70] Commission precedent has clarified that an appropriate notice-and-comment process can provide that opportunity.[71] But there was no such process here. Instead, the procedures here were entirely irregular: After GCI filed its application, USAC announced that it would engage in "heightened review," the Bureau took over the review process, and the proceedings then evolved from examining GCI's justifications to mandating a new methodology *without* notice-and-comment. The result was the prescription of practices, a rate of return, and specific charges in violation of Section 205.

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[68] *Id.* at 451.

[69] *Id.*

[70] 47 U.S.C. § 205(a).

[71] *See, e.g., Investigation of Access and Divestiture Related Tariffs*, FCC 84–201, CC Docket No. 83-1445, ¶ 113 (rel. May 15, 1984) (resolving cost issues and determining the legality of rates through notice-and-comment proceedings; finding that parties received "the full opportunity for hearing required by Section 205(b) of the Act").

V. Neither the Bureau nor the Commission May Depart from Settled Practice Without Fair, Advance Notice to Service Providers.

A. USAC repeatedly approved rates based on the same methodology in the past.

GCI has used the same methodology consistently over the years to justify the rural rates in its HCP contracts, and USAC has approved the methodology on multiple occasions. In 2009 to 2010, for example, USAC engaged in an extensive pre-commitment review of one of Alaska's largest health care providers, and that process ultimately approved funding for all of the providers' locations based on the methodology rejected here.[72] More recently, in August 2015, USAC audited several contracts from FY2012, for which GCI again used the same methodology, and USAC again approved the rates—rates that were in fact higher than those at issue here.[73] As noted above, USAC has no authority to set policy or interpret unclear rules, so GCI relied on those prior approvals as reflecting Bureau and Commission policy in continuing to use that methodology for FY2017 rural rates.[74]

B. GCI could not have discerned from past *approvals* of its rate methodology that the same approach would be *rejected* here, and the Bureau Decision therefore fails to provide fair notice.

An agency cannot penalize a regulated entity for violating the agency's rules unless that entity had "fair notice" of the rules.[75] The standard for whether an agency has provided fair notice is whether "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the

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[72] *See supra* n.1.
[73] *Id*.
[74] *See* 47 C.F.R. § 54.702(c).
[75] *See, e.g., SNR Wireless License Co., LLC v. FCC*, 868 F.3d 1021, 1043 (D.C. Cir. 2017); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995); *see also, e.g.*, *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000).

standards with which the agency expects the parties to conform."[76] This fair notice requirement applies whenever an agency "wishes to use [its new] interpretation" of vague or ambiguous rules "to cut off a party's right."[77] And an agency will be found to have failed to provide fair notice *even if the agency's new interpretation of the rules is reasonable* if, at the time of the conduct, a reasonable person exercising reasonable care would not have known there was a violation.[78]

Here, there is simply no way that GCI could have discerned from the past *approval* of its rates that rates based on the same methodology would be found to *violate* the rules. Moreover, in this case GCI was only informed of the purported violation *after* it had already bid on, contracted for, and provided the services at issue—which underscores the unfairness of the Bureau's *post-hoc* rate setting. Thus, while the full Commission may certainly adopt a new rate-setting methodology and new rates *prospectively*—provided that it does so consistent with the program requirements of 47 U.S.C. § 254(h) and the process set forth in 47 U.S.C. § 205—it may *not* do so without fair notice and then apply those changes retrospectively.

CONCLUSION

For the foregoing reasons, the full Commission should grant GCI's Application for Review of the Bureau Decision and approve GCI's initial rate justifications. Only with expeditious and decisive action can the Commission restore opportunity for rural Alaska broadband advancement in the coming year and, more broadly, provide all program participants the information necessary to engage the FY2019 competitive bidding process.

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76 *Trinity*, 211 F.3d at 628; *accord Otis Elevator Co. v. Sec'y of Labor*, 762 F.3d 116, 125 (D.C. Cir. 2014).

77 *Satellite Broad. Co., Inc. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987); *see also United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998) ("fair notice" requirement applies in the absence of "explicit penalties").

78 *See Chrysler*, 158 F.3d at 1355.

Respectfully submitted,

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November 9, 2018

EXHIBIT LIST

EXHIBIT AA
- Letter from Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur., at 2 (Oct. 10, 2018)

EXHIBIT A
- Letter from Jennifer P. Bagg, Counsel for GCI, to USAC, Rural Health Care Program (Nov. 21, 2017)
- FRN Justification Spreadsheet
- Supporting Invoices
- GCI Anchorage MPLS Rate Table
- Customer Comparables Sheet

EXHIBIT B
- Letter from Jennifer P. Bagg, Counsel for GCI, to USAC, Rural Health Care Program (Dec. 7, 2017)
- Customer Comparables Sheet Revised
- GCI TERRA Customer Comparables
- GCI Satellite Customer Comparables
- GCI Terrestrial Customer Comparables

EXHIBIT C
- Letter from Jennifer P. Bagg, Counsel for GCI, to USAC, Rural Health Care Program (Mar. 30, 2018)
- Master FRN Justification Spreadsheet
- Master FRN Justification Spreadsheet Key
- TERRA-Satellite-Terrestrial Comparables
- Local Loop Justification
- TERRA ROR Model
- Rate of Return Analysis of GCI's TERRA Network (Brattle TERRA Report)
- Commercial Customer Invoices
- E-Rate Contracts
- FRN Invoices
- TERRA Rate Tables
- Tariff Channel Termination Rates
- 2015 USAC Audit Letter
- Exhibit A: 2010 USAC Funding Commitment Letters
- Exhibit B: Breakdown of Rural Rates

EXHIBIT D
- Letter from Jennifer P. Bagg, Counsel for GCI, to USAC, Rural Health Care Program (Apr. 24, 2018)
- USAC Open Source GCI E-Rate Data
- TERRA DIAS Product and Pricing

EXHIBIT E

- Letter from John T. Nakahata et. al, Counsel for GCI, to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur. (May 15, 2018)
- E-rate Rural Rate Analysis – GCI Response
- Supporting Contracts

EXHIBIT F

- Letter from John T. Nakahata et. al, Counsel for GCI, to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur. (June 18, 2018)
- TERRA ROR Bandwidth Allocation
- TERRA ROR Revenue Allocation
- TERRA ROR Model (with revised Revenue Rate)
- Satellite ROR Model
- Rate of Return Analysis of GCI's Satellite-Based Services (Brattle Satellite Report)
- Satellite ROR Bandwidth Allocation
- Satellite ROR Revenue Allocation
- How Arbitrary is 'Arbitrary'

EXHIBIT G

- Letter from John T. Nakahata et. al, Counsel for GCI, to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur. (June 21, 2018)

EXHIBIT H

- Letter from John T. Nakahata et. al, Counsel for GCI, to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur. (June 29, 2018)
- TERRA ROR Bandwidth Allocation
- TERRA ROR Revenue Allocation
- TERRA Bandwidth Allocation/Utilization Report
- TERRA Bandwidth Allocation Methodology

EXHIBIT I

- Letter from Jennifer P. Bagg, Counsel for GCI, to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur. (July 2, 2018) ("July 2, 2018 Letter")
- Satellite ROR Bandwidth Allocation
- Satellite ROR Revenue Allocation

EXHIBIT J

- Email from John Nakahata, Counsel for GCI, to Elizabeth Drogula and Preston Wise (July 31, 2018)

EXHIBIT K

- Letter from Jennifer P. Bagg, Counsel for GCI, to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur. (Aug. 21, 2018)
- Revised Bandwidth Allocation Methodology
- Revised TERRA Bandwidth Utilization
- Revised TERRA ROR Cost Study (Bandwidth)

- Revised TERRA ROR Cost Study (Revenue)

EXHIBIT L

- Letter from Jennifer P. Bagg, Counsel for GCI, to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur. (Sept. 10, 2018)
- Satellite Proposal

EXHIBIT M

- Letter from Jennifer P. Bagg, Counsel for GCI, to Elizabeth Drogula, Deputy Div. Chief, Wireline Comp. Bur. (Sept. 17, 2018)